

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-4253

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-4253

MIANUS RIVER PRESERVATION COMMITTEE, et al.,

Petitioners,

v.

ADMINISTRATOR, ENVIRONMENTAL PROTECTION
AGENCY, et al.,

Respondents.

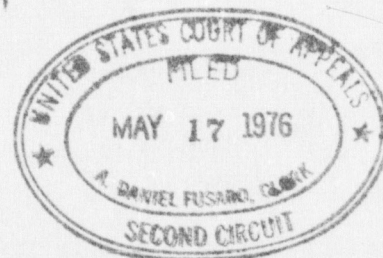
ON PETITION FOR REVIEW

BRIEF FOR THE FEDERAL RESPONDENT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-4253

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Petitioners,

v.

ADMINISTRATOR, ENVIRONMENTAL PROTECTION
AGENCY, et al.,
Respondents.

ON PETITION FOR REVIEW

BRIEF FOR THE FEDERAL RESPONDENT

AGENCY ACTION CHALLENGED

Petitioners challenge a permit modification issued by the Connecticut Department of Environmental Protection to the Greenwich Water Company on August 26, 1975. (Pet. App. 1). It is unreported.

JURISDICTION

Petitioners allege that jurisdiction of this Court exists under Section 509 of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. §1369).

QUESTION PRESENTED

1. Whether the Court has jurisdiction to review the action of an agency of the State of Connecticut in modifying a permit to the Greenwich water Company pursuant to an approved permit program.

STATEMENT

On August 26, 1975, the State of Connecticut Department of Environmental Protection modified a permit which it previously issued to the Greenwich Water Company. The permit was issued to limit discharges of pollutants into the waters of the Mianus River, as provided by state law developed in response to the Federal Water Pollution Control Act Amendments of 1972. Those Amendments, which substantially revised the prior federal law in this area, provide for a permit system to reduce pollutant discharges into the Nation's navigable waters.

The Federal Water Pollution Control Act provided for a federally administered permit program, known as the National Pollutant Discharge Elimination System (NPDES). (Section 402, 33 U.S.C. §1342). Permits issued under this system by the Administrator of the United States Environmental Protection Agency are subject to review in the Circuit Courts pursuant to Section 509(b)(1)(F) of the Act (33 U.S.C. §1369). Recognizing that the number of sources requiring permits would be quite large, Congress provided that states could develop their own permit program and issue

permits independently of the Administrator. Section 402(b) (33 U.S.C. §1342(b)). Any State desiring to substitute its own permit program for that initially established by EPA may apply to the Administrator for approval of its program. The Administrator must approve the state program unless he finds that the applicant State does not have adequate authority to issue permits as described in Section 402(b). Once a State program has been approved, EPA may not issue NPDES permits in that State. Section 402(c) 33 U.S.C. §1342(c).

In the instant case, the State of Connecticut developed its own permit program which was approved by the EPA Administrator by letter of September 26, 1973. (Resp. Motion to Dismiss, Ex. A.) Consequently, no NPDES permits are issued by the EPA Administrator for polluting sources within the State of Connecticut. Thus the threshold question in this case is whether or not the permit issued by the Connecticut Department of Environmental Protection is reviewable in this Court. For the reasons set forth in Federal respondent's motion to dismiss this action, we are of the opinion that this case may not be brought before this Court. By Order of February 10, 1976, this motion together with a similar motion filed by Connecticut, is now before this Court.

ARGUMENT

I. THIS ACTION IS NOT AUTHORIZED BY
SECTION 509 OF THE FEDERAL WATER POLLUTION
CONTROL ACT AMENDMENTS AND THEREFORE
JURISDICTION IS LACKING TO MAINTAIN IT

Petitioners seek to invoke this Court's jurisdiction under Section 509 of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. §1369). Subsection (b)(1) thereof provides in pertinent part:

Review of the Administrator's action . . . (F) in issuing or denying any permit under Section 402, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. . . .

On its face, Section 509 does not authorize the instant action. Petitioners readily admit that the permit in question was not issued by the EPA Administrator, but was rather issued by the State of Connecticut Department of Environmental Protection. (Pet. Br. 2). Since the permit was obviously not issued by the Administrator of EPA as Section 509 requires, it is quite plainly not within the jurisdictional grant of that Section.

To our knowledge, only one court has ruled on the question now before this Court -- namely, whether a state-issued NPDES permit is reviewable in a Federal Circuit Court. In Shell Oil Co. v. Train, (C.A. 9, No. 75-2070), Shell challenged various conditions in its NPDES permit issued by the State of California Regional Water Quality Control Board. As in this case, the petitioner sought

Court of Appeals review under Section 509. In a brief order dismissing the petition, the Ninth Circuit simply noted that the action of the State of California was not that of the EPA Administrator and accordingly, jurisdiction was lacking. (App. A). This holding is consistent with the treatment accorded Section 509 and its counterpart under the Clean Air Act, (42 U.S.C. §1857h-5). See particularly District of Columbia v. Train, C.A.D.C. No 75-1887, April 6, 1976, (App. B), and Utah International Inc. v. Environmental Protection Agency, et al., 478 F.2d 126 (C.A. 10, 1973). In both those cases, matters which were not specifically enumerated in the jurisdictional statute were held unreviewable in the Courts of Appeals. See, Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 376 (1939). This Circuit has strictly read Section 509. Sun Enterprises v. Train, (No. 75-6068, March 12, 1976).

This result is particularly compelling in the instant case, because the consequences of holding that state-issued permits are federally reviewable are substantial. To date, twenty seven States have a federally approved water permit program. ^{1/} EPA estimates that there are at least 40,000 sources of water pollution in the United States which

^{1/} California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Indiana, Kansas, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, New York, Ohio, Oregon, South Carolina, Vermont, Virginia, Washington, Wisconsin, Wyoming.

must each apply for and receive an NPDES permit. Thus, a majority of these permits may be issued by state authorities under state law and will not involve EPA, although the Agency does have authority, if it so chooses, to veto any state-issued permit found inconsistent with Federal law (Section 402(d)(2), 33 U.S.C. §1342(d)(2)). Accordingly, lawsuits contesting the validity of state-issued NPDES permits should be brought in the state courts under applicable state law. This result is consistent with the purpose of the Act which, as stated in part in Section 101(b) is to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. 1251(b). To further this purpose, the Act encourages the establishment of state NPDES programs to provide the states with the leading role in evaluating and issuing such permits. Allowing review of state-issued permits in the Federal Courts would not only frustrate the congressional policy of futhering state administration of pollution control activity, but it would also present a potential flood of petitions to the Circuit Courts that Congress did not intend.

In reviewing the legislative history of Section 509, it is clear that a state-issued permit was not to be considered EPA action for purposes of judicial review. During the House Debate on the Conference Report, Congressman Wright, a House Manager of the Bill, stated:

If the Administrator determines that a State has the authority to issue permits consistent with the Act, he shall approve the submitted program. In that event, the States, under State law, could issue State discharge permits. These would be State, not Federal, actions, and thus, whether for existing or new sources under Section 306, such permits would not require environmental impact statements.

If the Administrator, within 90 days of the transmittal date of a proposed permit by the State, objects in writing to the issuance of the permit as being outside the guidelines and requirements of the Act, the proposed permit shall not issue. This means that if the State proposes to issue an unlawful permit or one which does not meet the guidelines and regulations of this act, the Administrator may stop the issuance of the permit.

I must give added emphasis to this point. The managers expect the Administrator to use this authority judiciously; it is their intent that the act be administered in such a manner that the abilities of the States to control their own permit programs will be developed and strengthened. They look for and expect State and local interest, initiative, and personnel to provide a much more effective program than that which would result from control in the regional offices of the Environmental Protection Agency. (Emphasis added). (A Legislative History of the Water Pollution Control Act, Vol. 1, p. 262, hereinafter Leg. Hist.).

It is thus clearly the intent of Congress that state-issued permits, such as that challenged here, not be considered federal actions. Accordingly, since Section 509 provides review only of federal actions, that Section cannot provide jurisdiction in the instant case.

Lastly, petitioners argue throughout their brief that the EPA has a duty to veto the instant permit, and they further maintain that the failure to veto is an issue

properly before this Court. However, since a "non-veto" is not an Agency action, there is nothing to review. Shell Oil Co. v. Train, No. C-75-1291 not yet reported, slip op. 14 (N.D. Cal., 1976). A copy of the Shell case is attached as Appendix C. A federal veto, on the other hand, is challengeable as a federal permit denial under Section 509. It is, and it should be, treated differently from a "non-veto." A veto is the exception, not the rule.

The reason that the Courts of Appeals are granted jurisdiction under 509 is not to review each and every permit, but to speed implementation of the Act. Review was provided in the Courts of Appeals to expedite resolution of issues arising under the Act and to promote its uniform interpretation. See the Reports of the Senate Committee on Public Works, Leg. Hist. 1502-03, and of the House Committee on Public Works, Leg. Hist. 823. Section 509 is not intended to involve the Circuit Courts in every permit issued. Accordingly, state-issued permits are to be reviewed in state courts wherever possible.

CONCLUSION

Because the instant petition is not authorized by Section 509 of the Federal Water Pollution Control Act Amendments, this action should be dismissed for want of jurisdiction.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SINIEL OIL COMPANY,
Petitioner-Appellant

vs.

RUSSELL E. TRAIN, Administrator of
the Environmental Protection Agency,
and the ENVIRONMENTAL PROTECTION AGENCY

Respondent-Appellee

FILED

SEP 30 1975

EMIL E. MELEI, JR. CLERK
U. S. COURT OF APPEALS

No. 75-2670

ORDER

U.S. DEPARTMENT OF JUSTICE
ENVIRONMENTAL PROTECTION AGENCY
11 37 AM '75

Before: GOODWIN and WALLACE, Circuit Judges

Upon due consideration of the motion to dismiss, the opposition thereto and all material submitted in support of and in opposition to the motion, the Court issues the following order:

- (a) the petition for review is dismissed as to the first four issues raised therein on the ground that the Feb. 18, 1975 decision by the California Regional Water Quality Control Board was not an act by the Administrator of the Environmental Protection Agency such as would give this Court jurisdiction under Section 509(b)(1) of the Federal Water Pollution Control Act [33 USC §1369(b)(1)]; and,
- (b) the fifth and last issue raised by the petition for review is dismissed on the ground that the petition was not timely filed as required by 33 USC §1369(b)(1).

Mo Cal 9/22/75

William T. Sullivan

Stephen M. Allen

U.S. Circuit Judges

APPENDIX B

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Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1887

DISTRICT OF COLUMBIA, PETITIONER

v.

RUSSELL E. TRAIN, Administrator,
ENVIRONMENTAL PROTECTION AGENCY, RESPONDENTS

On Motion For Reconsideration Or Amplification

Filed April 6, 1976

Louis P. Robbins, Acting Corporation Counsel, *John C. Salyer* and *Richard G. Wise*, Assistant Corporation Counsel, were on the motion for petitioner.

Before: WRIGHT and MACKINNON, *Circuit Judges*

PER CURIAM: The District of Columbia (District) has sought direct review in this Court of the action of the Administrator of the Environmental Protection Agency (Administrator) in entering into and approving a Consent Agreement with the General Services Administration (GSA) which altered previously existing com-

pliance schedules for achieving primary ambient air quality standards affecting GSA's Central Heating and Refrigeration Plant and its West Heating Plant. In its Petition for Review filed September 11, 1975, the District asserted that this Court had jurisdiction to hear the appeal pursuant to Section 307(b)(1) of the Clean Air Act.¹ It particularly urged that the Consent Agreement contained "a compliance schedule portion of an implementation plan within the meaning of" Section 110² as its predicate for Section 307 jurisdiction. Petition for Review at 2.³

On October 7, 1975, EPA filed a motion to dismiss the petition for want of jurisdiction in this Court. After considering the motion, the response thereto and additional papers filed by the parties, a motions panel of this Court, finding that the Court in fact did lack jurisdiction, entered an order on January 26, 1976, granting the motion to dismiss. The District thereafter

¹ 42 U.S.C. § 1857h-5(b)(1). That section provides:

"A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 1857c-5 [section 110] of this title or section 1857c-6(d) [section 111(d)] of this title, or his action under section 1857c-10(e)(2)(A), (B), or (C) [section 119(c)(2)(A), (B), or (C)] of this title or under regulations thereunder, may be filed only in the United States Court of Appeals for the appropriate circuit."

² 42 U.S.C. § 1857c-5.

³ An implementation plan is a plan designed to assure compliance with a national primary or secondary ambient air quality standard. Such a plan must include, *inter alia*,

"emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard. . . ." Section 110(a)(2)(B) of the Act, 42 U.S.C. § 1857c-5(a)(2)(B). (Emphasis added)

filed a timely motion for reconsideration of the order, or alternatively for amplification of the Court's reasoning. For the reasons stated herein, we affirm the order of dismissal. We find that the Consent Agreement challenged here is not an action capable of direct review in this Court pursuant to Section 307(b)(1) of the Clean Air Act which is "exclusive in its terms," *Oljato Chapter of Navajo Tribe v. Train*, 169 U.S.App.D.C. 195, 198, 515 F.2d 654, 657 (1975).

- I -

The jurisdictional provisions of the Clean Air Act⁴ admittedly have been sources of periodic confusion.⁵ Therefore, proper disposition of a motion to dismiss for lack of jurisdiction requires precise characterization of the action sought to be reviewed. Cf. *Oljato Chapter of Navajo Tribe v. Train*, *supra*. In situations, such as presented here, where the statutory grant of jurisdiction—exclusive in its terms—delineates certain factual circumstances which give rise to direct review in a court of appeals, it is necessary for a court to determine if the action sought to be reviewed reasonably can be said to be embraced by the statute. We believe that a Consent Agreement executed by two agencies of the Executive Branch is not among the actions determined by Congress to be reviewable in the first instance in a court of appeals. Congress did not foresee the development and use

⁴Section 307(b), 42 U.S.C. § 1857h-5(b), and section 304, 42 U.S.C. § 1857h-2.

⁵See *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 168 U.S. App. D.C. 111, 121, 512 F.2d 1351, 1361 (1975) (Wright, J., concurring and dissenting), where it is noted that "courts play jurisdictional badminton with those provisions, batting one case back to the District Court under Section 304 while taking another identical one under Section 307. . . .")

of such a mechanism when it enacted Section 307 of the Clean Air Act. Rather, the Consent Agreement mechanism appears to be a post-hoc regulatory response to perceived, but unsettled, problems of federalism engendered by the complexities of the Act.

The Consent Agreement procedure is essentially an outgrowth of the on-going dispute between the states and the federal government over whether federal agencies are required to abide by both state substantive and procedural requirements for pollution abatement.⁴¹ As presently relevant, the dispute has arisen over the language contained in Section 118 of the Clean Air Act⁴² and the construction given that language by the Executive Branch.⁴³ The President has required heads of federal

⁴¹ Compare *Kentucky v. Ruckelshaus* 497 F.2d 1172 (6th Cir. 1974), cert. granted sub. nom. *Hancock v. Train*, 420 U.S. 971 (1975) (substantive only), with *People of St. of Calif., etc. v. Environmental Protection Agency*, 511 F.2d 963 (9th Cir.), cert. granted 422 U.S. 1041 (1975), and *Alabama v. Secber*, 502 F.2d 1238 (5th Cir. 1974) (substantive and procedural).

⁴² 42 U.S.C. § 1857f. Therein it is provided:

"Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements."

⁴³ On December 19, 1973, then-President Nixon issued Executive Order No. 11752, 38 Fed. Reg. 34792, which stated:

"Compliance by Federal facilities with Federal, State, interstate, and local substantive standards and substantive limitations to the same extent that any person is subject to such standards and limitations, will accomplish the objective of providing Federal leadership and coop-

agencies to cooperate with the Administrator and with state environmental agencies in the development of pollution abatement plans and of schedules for meeting applicable standards." He has additionally directed the Administrator to mediate any conflicts which might arise and to

"[d]evelop in consultation with the heads of other Federal agencies a coordinated strategy for Federal facility compliance with applicable standards specified in section 4 [of E.O. 11752] which incorporates, to the maximum extent practicable, common procedures for an integrated approach to Federal agency compliance with such standards, and issue such regulations and guidelines as are deemed necessary to facilitate implementation of that strategy and to provide a framework for coordination and cooperation among the Environmental Protection Agency, the other Federal agencies, and the State, interstate, and local agencies."

E.O. 11752 § 3(d) (5), 38 Fed. Reg. at 34795. Pursuant to this mandate, the Administrator published guidelines on May 12, 1975, 40 Fed. Reg. 20664, which, *inter alia*, introduced the Consent Agreement mechanism as the principal method for ensuring federal agency compliance with appropriate pollution control standards throughout the country. The process was described as a "documentation of a Federal facility's non-compliance with an applicable Federal, State, or local air pollutant emission limitation and the schedules and conditions under which the facility [would] be brought into compliance." 40 Fed. Reg. at

eration in the prevention of environmental pollution. *In light of the principle of Federal supremacy embodied in the Constitution, this order is not intended, nor should it be interpreted, to require Federal facilities to comply with State or local administrative procedures with respect to pollution abatement and control.*" § 1. (Emphasis added).

* E.O. 11752 § 3(2), 38 Fed. Reg. at 34794.

20665. The guidelines required all Consent Agreements to include a "timetable of increments of progress to abate emissions from each point in violation representing the Federal facility's commitment to achieve final compliance." *Id.* It is this aspect of the Consent Agreement challenged here which the District seeks to use as the factual predicate for its assertion of jurisdiction in this Court.

The instant Consent Agreement, apparently among the first executed by the Administrator, was an attempt by the Administrator to resolve a dispute between the District and GSA over GSA's failure to abide by pre-existing compliance schedules for the Central and the West Heating Plants which GSA had established with the District. When GSA failed to meet the schedules, the District issued an abatement order which contained a new compliance schedule requiring GSA to meet emission limitations by May 31, 1975. Apparently construing the order as a procedural requirement, GSA did not seek review, nor did it seek a variance; it simply refused to comply. On June 5, 1975, the District brought suit against GSA in the Superior Court for the District of Columbia seeking declaratory and injunctive relief. The suit was thereafter removed to the United States District Court for the District of Columbia, where it is currently pending. *District of Columbia, et al. v. Arthur Sampson, et al.*, Civil Action No. 75-1017. On August 15, 1975, more than two months after the suit was filed, the Administrator entered into the challenged Consent Agreement.

— II —

The District urges that we have jurisdiction over its challenge to the Consent Agreement pursuant to Section 307(b)(1) of the Clean Air Act.¹⁰ It suggests that since

¹⁰ See note 1 *supra*.

the Consent Agreement establishes compliance schedules for the two GSA heating plants different from previously established schedules, the Administrator's approval constitutes "an action in approving or promulgating any implementation plan under" Section 110.¹¹ We disagree.

Section 307(b)(1) grants exclusive jurisdiction to an appropriate court of appeals to hear challenges to a limited class of actions taken by the Administrator. By its terms, the statute allows review here only if the Administrator's actions are taken pursuant to Sections 110, 111(d), or 119(e)(2)(A), (B), or (C) of the Act. If the action is *not* taken pursuant to one of these provisions, a court of appeals is without authority to hear a challenge to it in the first instance. The District has not shown that the instant Consent Agreement was entered into in accordance with the statutory scheme; it merely asserts that since the Agreement tracks the statutory scheme in certain respects, particularly through the use of compliance schedules, it is tantamount to an action taken pursuant to statutory authority. While it is true that the Agreement does contain a compliance schedule, we do not believe that that fact alone, nor the existence of other similarities with a statutory implementation plan, may be used to bootstrap an extra-statutory action into a statutorily authorized one for jurisdictional purposes.

¹¹ Not involved here is an assertion of jurisdiction under § 110(f)(2)(B) of the Act, 42 U.S.C. § 1857e-5(f)(2)(B), which separately provides for judicial review "by the United States Court of appeals for the circuit which includes [the] State affected" by the Administrator's action under authority of Sections 110(f)(1) and (2)(A) of the Act, 42 U.S.C. §§ 1857e-5(f)(1) and (2)(A). Even had jurisdiction been so predicated, we would nevertheless dismiss for the reasons stated in this opinion.

The District rests its assertion of jurisdiction in this Court exclusively on a claim of Section 110 action by the Administrator. Section 110 of the Act is a complex provision concerning implementation plans which has given rise to extensive litigation over its proper construction. See *Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975), and cases cited therein. It carefully delineates the procedures which must be followed by the States and the Administrator in establishing the initial implementation plan and any revisions thereof. It does not address, however, the sensitive question of the role of federal facilities in this process.

The Executive Branch, taking the position that federal facilities need not comply with State procedural standards such as compliance schedules, developed its own set of procedural guidelines to ensure that federal facilities will ultimately meet substantive goals.¹² See Part I *supra*. In so doing, it created a clearly extra-statutory mechanism—one that is not within the scope of Section 110. Action taken pursuant to these guidelines is, therefore, beyond the scope of this court's Section 307 jurisdiction. In arriving at this conclusion we are mindful that the statute evinces an intent to allow review in courts of appeals of the Administrator's actions affecting implementation plans, but we believe that the specificity of the statutory grant of jurisdiction precludes review of the unique action presented here. The Consent Agreement derives its existence not from Section 110 but rather from the Executive Branch's interpretation of Section 118 and the regulatory response to the problems of federalism engendered thereby.¹³

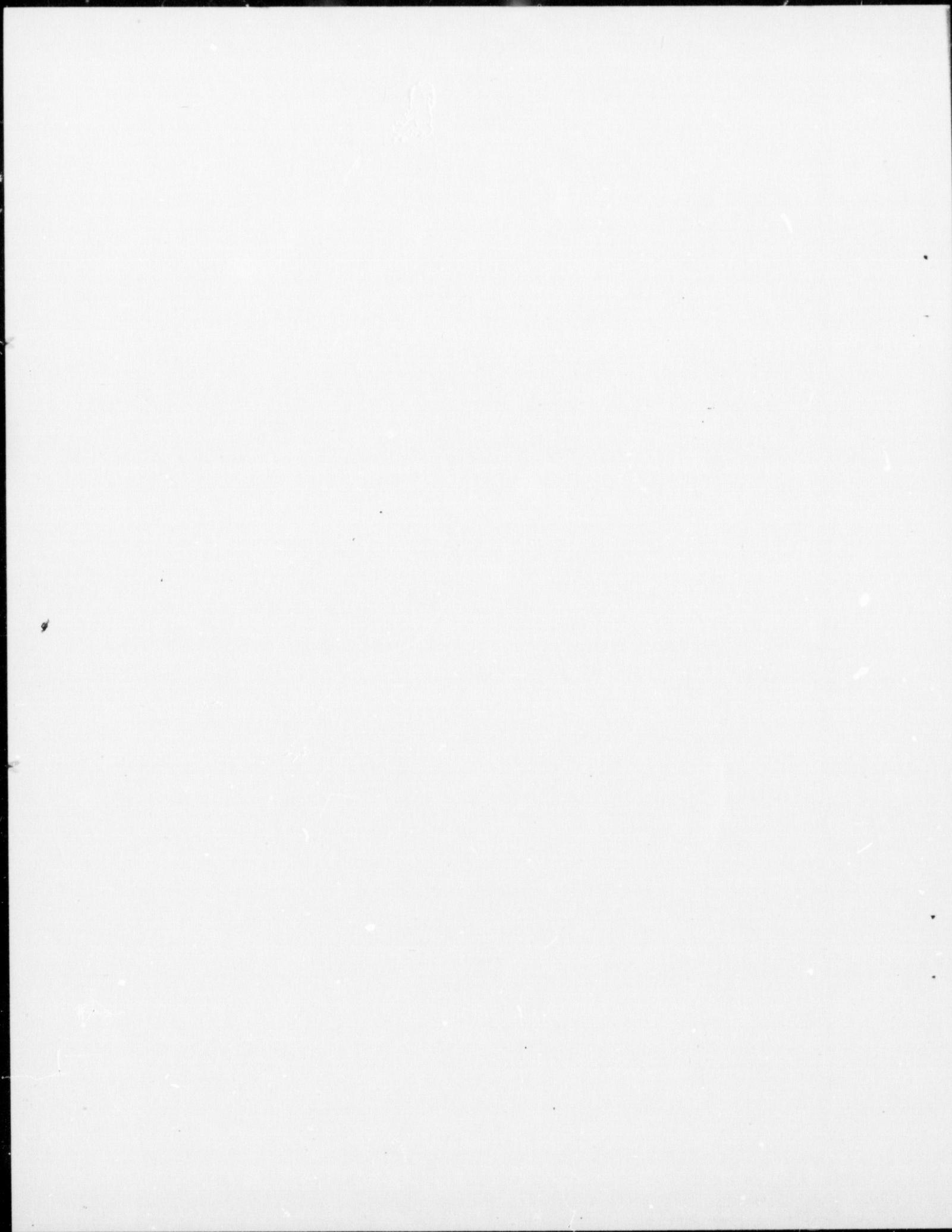
¹² We express no opinion as to the validity of this interpretation of the statute since that issue is not before us.

¹³ In an abundance of caution, we note in passing that if review of the action challenged herein is to be had *at all* it should be sought in the district court. Section 10 of the Ad-

The Petition for Review filed in the District therefore was dismissed for lack of jurisdiction, and for the reasons stated above we affirm that disposition.

Judgment accordingly.

Administrative Procedure Act, 5 U.S.C. §§ 701-706; *Pickus v. United States Board of Parole*, 165 U.S. App. D.C. 281, 286 & n. 4, 507 F.2d 1107, 1109 & n. 4 (1974).



APPENDIX C

- 20 -

REC'D U.S. ATTORNEY
SAN FRANCISCO, CALIF.
REFER TO

1976 MAR 23 24 35

FILED

MAR 22 1976

WILLIAM L. WHITTAKER, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SHELL OIL COMPANY,

Plaintiff,

v.

RUSSELL E. TRAIN and the
ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

No. C-75-1291 RFP

MEMORANDUM AND ORDER

This is a complex environmental protection action arising under the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 et seq. ("the Act"). Plaintiff Shell Oil Company has filed suit against the Environmental Protection Agency and its Administrator, Russell Train, to challenge the promulgation of administrative regulations governing the petroleum industry, and to challenge the issuance of a water pollution permit and denial of a variance from the specific regulations governing plaintiff's refinery at Martinez, California.

Presently before the court is defendant's motion to dismiss the entire action for lack of subject matter jurisdiction. From our review of the applicable legislation, we conclude that the district court lacks jurisdiction to consider any of the matters raised in plaintiff's complaint.

MAR 22 1976

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of Record

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I. THE FEDERAL WATER POLLUTION CONTROL ACT

Prior to 1972, the Federal Water Pollution Control Act of 1965 was keyed to a system of water standards: to en-join a suspected polluter, the government was required to prove that water near an industrial source had fallen below the applicable standards, and that the defendant had proximately caused the deterioration in water quality. Enforcement was entrusted to the states, which were chronically underfunded and thus unable to deter or prosecute violations of the statute. As characterized by one legislator, the elaborate statutory procedure never resulted in improved water quality anywhere.^{1/}

The 1972 legislation, while technically amending the Federal Water Pollution Control Act of 1965, in effect restructures and replaces all existing water pollution statutes. The Act establishes a comprehensive program designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" in pursuit of a "national goal that discharge of pollutants into navigable waters be eliminated by 1985." 33 U.S.C. § 1251(a). In achieving the ultimate objective of water purity, the statute relies primarily on a permit system. The permit regulatory device requires any entity seeking to discharge pollutant to obtain a permit; the permit restricts the entity to designated maximum "effluent limitations," or "quantities, rates, and concentrations of chemical, physical, biological, and other constituents dischargeable into navigable waters." 33 U.S.C. § 1362.

Establishing a timetable for industry compliance, the Act mandates that water pollution standards become increasingly stringent, and that each polluter be required to maintain a

^{1/} Muskie, "A Legislator's View of the Impending Amendments to the Water Pollution Control Act," 13 B.C. Ind. & Com. L. Rev. 629, 630-631 (1972).

1 progressively higher degree of effluent quality.^{2/} Effective
2 immediately, the statute prohibits discharge of any pollutant
3 into navigable waters unless the polluter holds a permit
4 specifying effluent limitations legally dischargeable. Section
5 402(a) of the Act authorizes the Administrator of the Environ-
6 mental Protection Agency to issue such permits nationwide.^{2/}
7 However, the Act contemplates a gradual decentralization of
8 permit-issuing authority; section 402(b) of the statute autho-
9 rizes a state to administer the program in lieu of the Ad-
10 ministrator provided that the state program satisfies minimum
11

12 ^{2/} Section 301(b) of the Act establishes a two-stage procedure:
13 by July 1, 1977, the Administrator shall require "application
14 of the best practicable control technology currently avail-
15 able;" by July 1, 1983, the Administrator shall require "appli-
16 cation of the best available technology economically achiev-
17 able." 33 U.S.C. §§ 1311(b)(1)(A), 1311(b)(2)(A). See,
18 "Federal Water Pollution Control Act Amendments of 1972," 1973
19 Wis.L.Rev. 893 (1973).

20 ^{3/} Section 402(a) of the Act provides in pertinent part:

21 "(1) Except as provided in sections 1328 and 1344 of this
22 title, the Administrator may, after opportunity for public hear-
23 ing, issue a permit for the discharge of any pollutant, or com-
24 bination of pollutants, notwithstanding section 1311(a) of this
25 title, upon condition that such discharge will meet either all
26 applicable requirements under sections 1311, 1312, 1316, 1317,
27 1318, and 1343 of this title, or prior to the taking of neces-
28 sary implementing actions relating to all such requirements,
29 such conditions as the Administrator determines are necessary
30 to carry out the provisions of this chapter.

31 (2) The Administrator shall prescribe conditions for such
32 permits to assure compliance with the requirements of paragraph
33 (1) of this subsection, including conditions on data and in-
34 formation collection, reporting and other such requirements as
35 he deems appropriate.

36 (3) The permit program of the Administrator under para-
37 graph (1) of this subsection, and permits issued thereunder,
38 shall be subject to the same terms, conditions, and require-
39 ments as apply to a State permit program and permits issued
40 thereunder under subsection (b) of this section.

41 (4) All permits for discharge into the navigable waters
42 issued pursuant to section 407 of this title, shall be deemed
43 to be permits issued under this title, and permits issued under
44 this title shall be deemed to be permits issued under section
45 407 of this title, and shall continue in force and effect for
46 their term unless revoked, modified, or suspended in accordance
47 with the provisions of this chapter.

48 ///

1 federal criteria.^{4/} To prevent lax enforcement of states fear-
2 ing industrial relocation, the Administrator retains a veto
3 power over all state issued permits.^{5/}

4 On May 14, 1973, the Administrator authorized the
5 State of California to administer a permit program for waters

6
7 Sections 402(a)(5) and 402(b) of the Act provide:

8 "402(a)(5) No permit for a discharge into the navigable
9 waters shall be issued under section 407 of this title after
10 October 18, 1972. Each application for a permit under section
11 407 of this title, pending on October 18, 1972, shall be deemed
12 to be an application for a permit under this section. The
13 Administrator shall authorize a State, which he determines has
14 the capability of administering a permit program which will
15 carry out the objectives of this chapter, to issue permits for
16 discharges into the navigable waters within the jurisdiction of
17 such State. . . . Each such permit shall be subject to such
18 conditions as the Administrator determines are necessary to
19 carry out the provisions of this chapter. No such permit shall
20 issue if the Administrator objects to such issuance.

21 402(b) At any time after the promulgation of the guide-
22 lines required by subsection (h)(2) of this title, the Governor
23 of each State desiring to administer its own permit program for
24 discharges into navigable waters within its jurisdiction may
25 submit to the Administrator a full and complete description of
26 the program it proposes to establish and administer under State
27 law or under an interstate compact. In addition, such State
28 shall submit a statement from the Attorney General (or the at-
29 torney for those states water pollution control agencies which
30 have independent legal counsel) or from the chief legal officer
31 in the case of an interstate compact, that the laws of such
32 state, or the interstate compact, as the case may be, provide
adequate authority to carry out the described program. The
Administrator shall approve each such submitted program unless
he determines that adequate authority does not exist (to per-
form eight designated functions)."

33
34 5/ Section 402(d) of the Act provides:

35 "(1) Each State shall transmit to the Administrator a copy of
36 each permit application received by such State and provide
37 notice to the Administrator of every action related to the con-
38 sideration of such permit application, including each permit
39 proposed to be issued by such State.

40 (2) No permit shall issue (A) if the Administrator within
41 ninety days of the date of his notification under subsection
42 (b)(5) of this section objects in writing to the issuance of
43 such permit, or (B) if the Administrator within ninety days of
44 the date of transmittal of such permit by the State objects in
45 writing to the issuance of such permit as being outside the
46 guidelines and requirements of this chapter."

47
48 ///

1 within its boundaries. 39 Fed.Reg. 26061. The designated
2 state administering body is the State Water Quality Control
3 Board ("State Regional Board"). Pursuant to a Memorandum of
4 Understanding Regarding Permit and Enforcement Programs exe-
5 cuted between the state and the Administrator, all permit ap-
6 plications are routinely transmitted to EPA's regional office
7 in San Francisco for review and comment before decision by the
8 State Regional Board.

9
10 II. BACKGROUND OF THE PRESENT LITIGATION

11 Plaintiff Shell Oil Company owns and operates a
12 petroleum refinery and organic chemical plant near Martinez,
13 California ("Martinez plant").^{6/} In compliance with the Act,
14 plaintiff applied to the State Regional Board for a permit to
15 discharge polluting material into the local waters near
16 Martinez. The State Regional Board, applying the national
17 effluent regulations promulgated for petroleum refining,^{1/}
18 prepared a proposed permit for plaintiff's refinery and trans-
19 mitted a copy to the EPA regional office on October 15, 1974.
20 With EPA approval, the State Regional Board issued a permit
21 designating the Martinez plant a "Class E" refinery and applying
22 the effluent limitations promulgated for Class E facilities.^{3/}

23
24 ^{5/} Plaintiff characterizes the Martinez facility as "a combina-
25 tion of a petroleum refinery lube oil-plant and an extensive
26 organic chemical plant which includes approximately twenty lube
chemical processes."

27 ^{1/} The applicable limitations promulgated for the petroleum in-
28 dustry were published on May 9, 1974. 39 Fed.Reg. 16560.
29 Amendments to the petroleum industry regulations were published
30 on May 20, 1975. 40 Fed.Reg. 21939.

31 ^{8/} The guidelines applicable to petroleum refineries divide re-
32 fineries into five subcategories, A through E. 39 Fed.Reg.
16560, 40 Fed.Reg. 21939. Plaintiff contends in this litigation
that its Martinez facility should properly be designated a
Class D refinery. Complaint, ¶24.

1 Since effluent limitations are formulated from eval-
2 uation of a representative sampling of petroleum refineries,
3 and since individual refineries exist with processes fundamen-
4 tally different from the sample facilities, the regulations
5 authorize a petitioner to obtain a variance from the effluent
6 limitations applicable to a designated category of refineries.
7 39 Fed.Reg. 16572. Plaintiff, contending that its Martinez
8 facility is fundamentally different from the sample facilities
9 used in formulating limitations for the petroleum industry,
10 petitioned the State Regional Board on November 13, 1974, for
11 a variance for its facility. The State Regional Board for-
12 warded plaintiff's application to EPA's regional office on
13 November 25, 1974, for comment. The EPA regional office wrote
14 a letter in February, 1975, recommending denial of plaintiff's
15 application. Following a public hearing on plaintiff's permit,
16 the State Regional Board denied the requested variance.

17 Plaintiff filed the present action on June 20, 1975,
18 against defendants EPA and Russell Train; no state officers are
19 joined as defendants. Plaintiff alleges that although the
20 State Regional Board has formal authority to issue permits, and
21 did technically issue the Martinez permit and deny the petition
22 for a variance, the Administrator "made all the material deci-
23 sions" and the State Regional Board functioned as a rubber
24 stamp for the federal decisions.

25 Plaintiff's complaint attacks application of the
26 Federal Water Pollution Control Act to the petroleum industry
27 generally and to the Martinez facility specifically:

28 1. Plaintiff claims that the effluent regulations
29 promulgated for petroleum refineries [39 Fed.Reg. 16560 and 40
30 Fed.Reg. 21939] are beyond the scope of the Administrator's
31 statutory authority, are based on invalid methodology, and are
32 formulated in disregard of statutory factors.

2. Plaintiff claims that its Martinez facility should properly be designated a Class D and not a Class E refinery, or, alternatively, that plaintiff should be granted a variance from the Class E effluent limitations.

Plaintiff seeks a judicial declaration invalidating the effluent limitations promulgated for petroleum refineries and further seeks an injunction ordering the Administrator to issue plaintiff's Martinez facility a Class D permit, or, alternatively, ordering the Administrator to grant plaintiff a variance from the Class E effluent limitations.

III. DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION

Concurrently with the present action, plaintiff filed similar challenges to the Administrator's determinations in two other tribunals: the Ninth Circuit Court of Appeals^{9/} and the California Regional Water Quality Control Board.^{10/} Defendants moved to dismiss the petition in the Court of Appeals. On September 22, 1975, the Ninth Circuit, granting defendants' motion, issued the following order:

(a) The petition for review is dismissed as to the first four issues raised therein [challenging the permit issued to the Martinez facility and the request for a variance] on the ground that the February 18, 1975 decision by the California Regional Water Quality Control Board was not an act by the Administrator of the Environmental Protection Agency such as would give this Court jurisdiction under Section 509(b)(1) of the Federal Water Pollution Control Act [33 U.S.C. §1369(b)(1)]; and

(b) the fifth and last issue raised by the petition for review [challenging the effluent regulations promulgated for the petroleum industry] is dismissed on the ground that the petition was not timely filed as required by 33 U.S.C. §1369(b)(1).

^{9/} Shell Oil Company v. Russell E. Train and Environmental Protection Agency, No. 75-2070.

^{10/} Case No. A-99.

1 The interpretation of this order--which of course
2 controls our decision in the present case--is vigorously dis-
3 puted by the parties. Plaintiff contends that denial of juris-
4 diction by the appellate court necessarily implies that review
5 of agency action lies in the district court under the Adminis-
6 trative Procedure Act, 5 U.S.C. § 701 et seq. Defendants con-
7 tend that: part (a) of the circuit court order establishes
8 that no federal forum has jurisdiction over the permit and
9 variance processes, which were entirely controlled by state of-
10 ficials; and part (b) of the circuit court order holds that
11 jurisdiction to review effluent regulations is properly in the
12 appellate courts, but that plaintiff's challenge in the present
13 case was untimely.

14
15 A. Jurisdiction to Review Effluent Regulations Promulgated for
16 the Petroleum Industry

17 In determining the proper forum for review of regula-
18 tions promulgated for the petroleum industry [39 Fed.Reg. 16560,
19 40 Fed.Reg. 21939] our inquiry commences with the judicial re-
20 view provision of the Federal Water Pollution Control Act.
21 Section 509 of the Act states:

22 (b)(1) Review of the Administrator's action (A)
23 in promulgating any standard of performance
24 under section 1316 of this title, (B) in making
25 any determination pursuant to section 1316
26 (b)(1)(C) of this title, (C) in promulgating any
27 effluent standard, prohibition, or pretreatment
28 standard under section 1317 of this title, (D)
29 in making any determination as to a State permit
30 program submitted under section 1342 of this
31 title, (E) in approving or promulgating any ef-
32 fluent limitation or other limitation under
section 1311, 1312, or 1316 of this title, and
(F) in issuing or denying any permit under sec-
tion 1342 of this title, may be had by any inter-
ested person in the Circuit Court of Appeals of
the United States for the Federal judicial dis-
trict in which such person resides or transacts
such business upon application by such person.
Any such application shall be made within ninety
days from the date of such determination, approval,
promulgation, issuance, or denial, or after such
time only if such application is based solely on
facts which arose after such ninetieth day.

33 U.S.C. § 1359.

In determining the scope of circuit court jurisdiction over water pollution control, the courts have divided on the issue of review of regulations promulgated by the Administrator. The source of the controversy stems from the legislative ambiguity concerning the precise statutory authority for promulgation of effluent regulations: do the administrative regulations constitute "effluent limitations" within the meaning of section 301^{11/} of the Act, or do they constitute "effluent guidelines" within the meaning of section 304^{12/} of the Act? Determination of the Administrator's authority is a necessary prerequisite to resolution of the jurisdictional issue, because section 509 expressly includes section 301 and conspicuously omits section 304 among the statutory enumeration

^{11/} Section 301(b) of the Act provides in pertinent part:

"(b) In order to carry out the objectives of this Act there shall be achieved--

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act. . . .

(2)(A) not later than July 1, 1983, effluent limitations for categories and classes of point sources other than publicly controlled treatment works, which (i) shall require application of the best available technology economically achievable. . . as determined in accordance with the regulations issued by the Administrator pursuant to section 304(b)(2) of the Act." 33 U.S.C. § 1311(b).

^{12/} Section 304(b) of the Act provides in pertinent part:

"(a)(1) the Administrator . . . shall develop and publish . . . criteria for water quality. . .

(b) For the purpose of adopting or revising effluent limitations under this Act the Administrator . . . shall publish . . . regulations providing guidelines for effluent limitations. . . . Such regulations shall--

(B) specify factors to be taken into account in determining the best measures and practices available to comply with subsection (b)(2) of section 301 of this Act . . ."

33 U.S.C. § 1314.

///

1 of reviewable items. Therefore, if the Administrator's power
2 to promulgate regulations stems from section 301 of the Act,
3 the regulations are subject to circuit court review; if the
4 Administrator's authority to promulgate regulations stems from
5 section 304 of the Act, the circuit courts are expressly
6 stripped of jurisdiction, which arguably lies in the district
7 courts under the Administrative Procedure Act. In resolving
8 this issue, the courts have agreed only that the statute is
9 ambiguous, and have disagreed in "deciphering the legislative
10 intent from reading scraps and bits of a convoluted legislative
11 history." American Iron and Steel Institute v. EPA, 8 E.R.C.
12 1321, 1346 (3d Cir. 1973) (Adams, J., concurring).

13 Of the eight courts which have considered the issue,
14 only one has concluded that the Administrator's authority to
15 publish discharge regulations stems from section 304, and that
16 jurisdiction is therefore vested in the district courts. CPC
17 International, Inc. v. Train, 515 F.2d 1032 (8th Cir. 1975).
18 Against CPC is marshalled an array of opinions which have con-
19 cluded that the Administrator's authority to promulgate regu-
20 lations is grounded in section 301 or in a combination of sec-
21 tions 301 and 304; in either case, jurisdiction to review ad-
22 ministrative regulations is vested in the Court of Appeals.
23 E.I. duPont de Nemours and Company v. Train, ___ F.2d ___ (4th
24 Cir. 1975), aff'g 383 F. Supp. 1244 (W.D. Va. 1974); American
25 Petroleum Institute v. Train, ___ F.2d ___ (10th Cir. 1975),
26 aff'g 7 E.R.C. 1795 (D.Colo. 1975); American Meat Institute v.
27 Environmental Protection Agency, 8 E.R.C. 1369 (7th Cir. 1975);
28 American Iron and Steel Institute v. Environmental Protection
29 Agency, 8 E.R.C. 1321 (3d Cir. 1975); American Paper Institute
30 v. Train, 381 F. Supp. 553 (D.D.C. 1974).

31 From our review of the case law, we have concluded
32 that the majority position is sound. The decisions supporting

1 appellate jurisdiction have pointed out the anomalous results
2 which would flow from adopting plaintiff's contention that re-
3 view of the Administrator's regulations is vested in the dis-
4 trict court. First, jurisdiction to review regulations would
5 be fragmented between the district and circuit courts: regu-
6 lations governing existing sources would be reviewable in the
7 district court, while regulations governing new sources would
8 be reviewable in the circuit courts. 33 U.S.C. § 1315.^{13/}
9 Second, under plaintiff's interpretation of the statute, in-
10 dividual permits would be reviewable in the appellate courts,
11 33 U.S.C. § 1342, while the industrywide national regulations
12 on which the permits were based would be reviewable in the dis-
13 trict courts. American Meat Institute v. EPA, 8 E.R.C. 1369
14 (7th Cir. 1975). This fragmentation of judicial authority
15 would reinject into water pollution control the cumbersome pro-
16 cedures which the 1972 amendments were designed to eliminate.

17 We note also that the water pollution control amend-
18 ments--together with other environmental legislation enacted
19 during the early 1970s--were passed in a climate of legislative
20 urgency. The express intent of both the Federal Water Pollu-
21 tion Control Amendments and the Clean Air Act, 42 U.S.C.
22 § 1857c-5, was to streamline decision-making and ensure prompt
23 high-level judicial review. American Iron and Steel Institute
24 v. EPA, 8 E.R.C. 1321 (3d Cir. 1975); American Meat Institute
25 v. EPA, 8 E.R.C. 1969 (7th Cir. 1975); E.I. duPont de Nemours
26 and Company v. Train, 383 F. Supp. 1244 (W.D. Va. 1974),

27
28 ^{13/}
29 The practical difficulty of such a division of judicial
30 business is illustrated in E.I. duPont de Nemours and Company
31 v. Train, ___ F.2d ___ (4th Cir. 1975): "Assume that an exist-
32 ing plant licensed under the Act expands. It is possible that
the expanded portion of the plant would constitute a new plant
source within the meaning of § 306. In that event, the plant
could be compelled to maintain two actions simultaneously, one
in the district court and another in the court of appeals."
Slip opinion at 16.

1 aff'd ___ F.2d ___ (4th Cir. 1975). This legislative policy
2 indicates a congressional determination to vest jurisdiction
3 over discharge regulations in the circuit courts.

4 Finally, we heed the Supreme Court's repeated
5 admonition that where a statute is fairly susceptible of con-
6 flicting interpretations, the construction adopted by the
7 agency charged with its administration is entitled to defer-
8 ence. Train v. NRDC, 43 U.S.L.W. 4467 (April 16, 1975)
9 (upholding Environmental Protection Agency interpretation of
10 Clean Air Act) See also: Udall v. Tallman, 380 U.S. 1,
11 16-18 (1966); Powder Reaction Co. v. Electricians, 367 U.S. 396,
12 408 (1961).

13 We conclude therefore that review of the challenged
14 regulations governing the petroleum industry is properly in
15 the Court of Appeals, and further conclude that the Ninth Cir-
16 cuit implicitly adopted this construction in its order of
17 September 30, 1975. The court dismissed plaintiff's challenge
18 to the petroleum regulations on the ground that the petition
19 was not filed within the statutory 90-day limitations period;
20 if the Ninth Circuit had declined jurisdiction on the ground
21 that review was properly in this court, it would surely have so
22 stated.

23
24 B. Jurisdiction to Review the Permit Issued to the Martinez
25 Facility and Denial of Plaintiff's Petition for a Variance

26 Plaintiff's second major attack in this litigation
27 is against the specific decisions governing the Martinez facil-
28 ity--the issuance of a Class E permit and the denial of
29 14/

30 33 U.S.C. § 1369(b)(1). The challenged regulations were
31 promulgated on May 4, 1974; plaintiff filed its petition over
32 a year later, on May 14, 1975. A timely petition challenging
 the identical regulations governing the petroleum industry was
 filed in the Tenth Circuit. American Petroleum Institute v.
 Train, No. 74-1465 (10th Cir.).

1 plaintiff's petition for a variance from Class E regulations.
2 Both orders were issued by the State Regional Board; however,
3 plaintiff claims that the federal EPA exercised tight control
4 over the decision-making process and that the state agency
5 merely rubber-stamped the federally-dictated rulings. Accord-
6 ingly, claims plaintiff, jurisdiction to review these actions
7 lies in the district court. We disagree.

8 While the allocation of authority between the state
9 and federal governments might have been more clearly delineated
10 in the Act, the legislative history indicates a basic Congres-
11 sional policy of preserving the primary role of the states in
12 controlling water pollution. The Senate Report states:

13 Against the background of the Clean Air Act and
14 the Refuse Act the Committee concluded that the
15 enforcement presence of the Federal government
16 shall be concurrent with the enforcement powers
17 of the States. The Committee does not intend
18 that this jurisdiction of the Federal government
19 to supplant state enforcement. Rather the Com-
20 mittee intends that the enforcement power of the
21 Federal government be available in cases where
22 the States and other appropriate enforcement
23 agencies are not acting expeditiously and vigor-
24 ously to enforce control requirements.

25 The Committee intends the great volume of en-
26 forcement actions be brought by the States.

27 Senate Report (Public Works Committee), No.
28 92-414, October 28, 1971, U.S. Code Congres-
29 sional and Administrative News 92 Congress,
30 Second Session (1972).

31 This language suggests that Congress did not intend
32 the environmental effort to be subject to a massive federal
33 bureaucracy; rather, the states were vested with primary re-
34 sponsibility for water quality, triggering the federal enforce-
35 ment mechanism only where the states defaulted. One commenta-
36 tor, characterizing the state-federal relationship as a
37 "partnership," noted: "The overall structure is designed to
38 give the states the first opportunity to insure its proper
39 implementation. In the event that a state fails to act,

1 federal intervention is a certainty." McThenia, "An Examination
2 tion of the Federal Water Pollution Control Act Amendments of
3 1972," 30 Wash. & Lee L. Rev. 195, 206 (1973).

4 In the present case, the state did not fail to act:
5 using its own personnel and apparatus, the State Regional
6 Board acted on plaintiff's application for a permit and for a
7 variance. The state requested and received advice from the
8 regional office of the federal Environmental Protection Agency;
9 however, we do not believe that this advice rises to the level
10 of behind-the-scenes coercion charged by plaintiff. It is
11 true that the Administrator of the federal Environmental Protection
12 Agency has authority to veto any permit which fails
13 to conform to federal standards. 33 U.S.C. § 1342(d). However,
14 it is a logical leap to equate the federal failure to
15 veto with federal control sufficient to invoke federal jurisdiction.
16 If the federal agency had exercised its veto power,
17 there would have been federal action reviewable in a federal
18 forum; however, the mere failure to disapprove a state administrative
19 action cannot be deemed decision-making by a federal
20 body.

21 Moreover, we think that the Ninth Circuit's order of
22 September 30, 1975, is quite explicit on this aspect of the
23 litigation. The court held that the "decision by the California
24 Regional Water Quality Control Board was not an act by
25 the Administrator of the Environmental Protection Agency such
26 as would give this Court jurisdiction under Section 509(b)(1)
27 of the Federal Water Pollution Control Act." Plaintiff's interpretation
28 of this order as vesting jurisdiction in the district
29 court is untenable; section 509 of the Act expressly
30 provides that where review of the permit-issuing process is in
31 the federal courts, jurisdiction is vested in the Courts of
32 Appeals: 33 U.S.C. § 1369(b)(1)(F). Thus, the Ninth Circuit

1 order clearly holds that no federal action was involved in the
2 Martinez permit or variance, and that review of the State Re-
3 gional Board's determination is properly in the state tri-
4 bunals.^{15/}

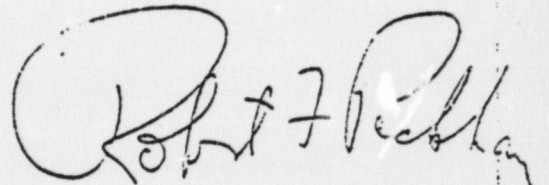
5
6 IV. CONCLUSION

7 Under the Federal Water Pollution Control Act, the
8 district court lacks jurisdiction to review any of the adminis-
9 trative determinations challenged in plaintiff's complaint.
10 Our ruling does not leave plaintiff remediless: plaintiff may
11 pursue its challenge to the petroleum regulations in the Tenth
12 Circuit, and may pursue its challenge to the Martinez permit
13 and variance determinations in the state tribunals.

14 Accordingly, defendants' motion to dismiss this ac-
15 tion for lack of subject matter jurisdiction is granted.

16 IT IS SO ORDERED.

17 Dated: March 17, 1976
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United States District Judge

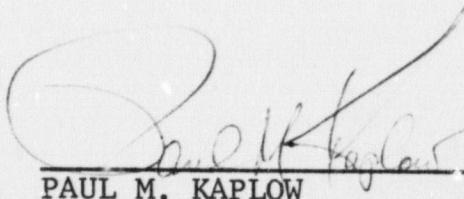
31 ^{15/} Plaintiff is entitled to challenge the Regional Board's de-
32 cision in the State Board. Cal. Water Code § 13320. From the
State Board's decision, plaintiff may appeal to the California
Superior Court. Cal. Water Code § 13330.

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of May, 1976,
I mailed two (2) copies of Respondents' Brief to:

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